

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**



# 77-1001

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

Docket No. 77-1001

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

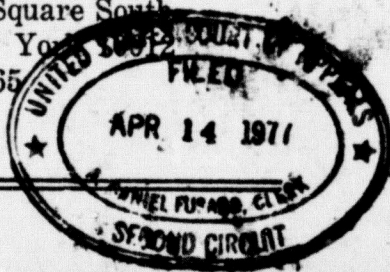
—v.—

MATTHEW MADONNA,  
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**APPELLANT'S PETITION FOR REHEARING WITH A  
SUGGESTION THAT THIS BE IN BANC**

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MATTHEW MADONNA,  
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**Preliminary Statement**

Madonna was convicted, after a jury trial before Hon. Robert L. Carter, of conspiring to violate 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) and 952(a) and of a substantive offense under 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A). He was sentenced to a maximum term of fifteen-years imprisonment on each count, the terms to run consecutively, and was fined \$25,000 on each count. On April 4, 1977, defendant's appeal was argued before a panel of this court, consisting of Hon. Ellsworth A. Van Graafeiland, Circuit Judge, and Hon. Milton Pollack and Hon. Jacob Mishler, District Judges sitting by designation. The conviction was affirmed from the bench.

**Introduction**

Since this court wrote no opinion,<sup>1</sup> the conventional grounds for a petition for rehearing are absent here. The grounds urged are rather that the affirmance from the bench in this case was not only a wrong disposition but was also an improper procedure, creating an appear-

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<sup>1</sup> The court made a brief statement. Counsel have written to the Clerk, requesting a copy of this statement, but it has not yet been received.

ance of injustice to the defendant and posing a threat to the institutional morality of the judicial system. As appears below, substantial issues were raised on the appeal that involved important questions under the Federal Rules of Evidence. Moreover, the affirmance from the bench may be construed as being in conflict with the decisions of two other circuit courts of appeal. A rehearing in banc, whatever the outcome, is necessary to reassure the profession and the community that narcotics defendants are not to be excluded from the orderly process of a reasoned, published application of principles and rules to the record under review.

### **Grounds of Appeal**

Defendant advanced numerous points on appeal. This petition will not reopen most of those issues but will concentrate on the major grounds that, we submit, were both incorrectly and unreasonably disposed of in the affirmance from the bench.

#### **1. The Prior Conviction**

Before trial Madonna had moved that a twenty-two year old conviction for homicide, entered against him when he was eighteen years old, should not be admitted to impeach him if he took the stand. Without any hearing or making any findings, the trial court baldly denied the application in an endorsement on the motion papers entered before the government's case had closed. Madonna then elected not to testify.

Under Rule 609(a), Fed. R. Ev., such a prior conviction is only admissible for impeachment if the court determines that "the probative value of admitting [it] outweighs its prejudicial effect to the defendant". Appellant Madonna's main brief referred to ample authority that homicide convictions should generally not be admitted for this purpose, especially so stale a one as this. The main brief and reply brief further cited abundant authority both in the legislative history, the commentaries and the case-law to the effect that the Federal Rules

have shifted the burden of proof on this question to the prosecution and that, in this regard, pre-Rules cases are irrelevant.

In the instant case the government never responded to the defense motion. Nevertheless, the government argued in its brief that the court was adequately informed about the nature of the prior conviction from information adduced at pre-trial bail hearings. Madonna's reply brief pointed out that the government's citations to these hearings referred not to evidence but to unsupported statements by the prosecutor and that there was no evidence that the trial judge had even perused the prosecutor's speeches.<sup>2</sup>

As far as can be gathered from the exchange at oral argument and from recollection of the brief statement read at the time of affirmance, this court appears to have found that the trial judge made an informed determination. Even if this were a tenable position, a strong argument can be made that admitting a twenty-two year old homicide conviction was simply wrong. This court never addressed that question. But to regard the determination as informed is impossible on the facts. The judge held no hearing, heard no argument and gave the defendant no opportunity to challenge the assertions made by the prosecutor at the bail hearing as to the circumstances of the homicide.

Decisions from other circuits appear to regard this as an improper procedure under the Rules. In *United States v. Mahone*, 537 F.2d 922, 928-929 (7th Cir. 1976), the trial court had announced that he would permit the impeachment of the defendant "on the basis of the record now before [the court]". In reviewing this disposition the Seventh Circuit Court of Appeals held that the

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<sup>2</sup> Had a hearing been held, Madonna would have contested the recital of the circumstances of his prior conviction as recounted in the prosecutor's speeches during the bail hearings. Madonna's reply brief demonstrated irrefutably that the references in the government's brief to the discussion of the prior conviction in the bail hearings were misrepresentations.

language of the court below implicitly indicated that it had weighed the prejudicial effect against the probative value. The court went on:

In the future, to avoid the unnecessary raising of the issue of whether the judge has meaningfully invoked his discretion under Rule 609, we urge trial judges to make such determinations *after a hearing on the record, as the trial judge did in the instant case*, and to explicitly find that the prejudicial effect of the evidence to the defendant will be outweighed by its probative value. . . . *Bearing in mind that Rule 609 places the burden of proof on the government . . . the judge should require a brief recital by the government of the circumstances surrounding the admission of the evidence, and a statement of the date, nature and place of the conviction. The defendant should be permitted to rebut the government's presentation, pointing out to the court the possible prejudicial effect to the defendant if the evidence is admitted.* (Emphasis added). *Id.*

In *United States v. Smith*, — F.2d —, Slip Op. No. 75-1920 (D.C. Cir., Dec. 17, 1976), the court referred to the language of Judge (now Chief Justice) Burger in *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir.), *cert. denied*, 390 U.S. 1020 (1967):

[A]cts of violence 'generally have little or no direct bearing on honesty and veracity', thus implying that virtually any showing of prejudicial effect should be sufficient to exclude evidence of such prior convictions. Slip Op. at 35.

Finding that the trial judge had wrongly failed to apply the Federal Rules, the *Smith* court reversed, and, in light of that reason for its decision, said that it need not assess the independent significance of the lack of an *explicit* finding that probative value outweighed the prejudice to the defendant. But the court went on to say:

However, it must be obvious to any careful trial judge that an explicit finding in the terms of the Rule can be of great utility, if indeed not required, on appellate review. Slip Op. at 17-18, n.17.

The affirmance from the bench in the instant case thus appears to be contrary to the holding in *Mahone* and the dicta in *Smith*.

In its brief the government further sought to justify the ruling below by relying on a line of cases in this circuit, exemplified by *United States v. Costa*, 425 F.2d 950 (2d Cir. 1969), *cert. denied*, 398 U.S. 938 (1970), that held that the trial judge need not pass on a motion such as the defendant's unless he had the basis for a meaningful decision, which must include a proffer of the nature of defendant's proposed testimony. In the oral argument on the appeal this court appeared impressed by this reasoning and by the authority of *Costa* in particular. But *Costa* and its companion decisions were pre-Rules cases, decided when the burden was on the defendant. They have no application today. Further, they are surely extremely suspect in the light of the emphasis placed by the Supreme Court and other courts in recent years on the constitutional dimension of the defendant's right to testify and the impropriety of annexing conditions to this right.

In a number of cases since 1971 the Supreme Court has spoken of the defendant's right to testify as being incorporated in the concept of due process and therefore having constitutional stature. See *Harris v. New York*, 401 U.S. 222, 225 (1971); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Brooks v. Tennessee*, 406 U.S. 605, 613 (1972); *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975). The right to testify has "come to be recognized as having an importance similar to the right to be present at one's trial and to present a defense". *United States v. Bentvena*, 504 F.2d 916 (2d Cir. 1963). See too *United States v. Poe*, 352 F.2d 639 (D.C. Cir. 1965).

In *Brooks v. Tennessee, supra*, the Supreme Court held that a Tennessee statute, requiring a defendant to testify as the first defense witness or not at all, constituted an "impermissible restriction on the defendant's freedom of choice". 406 U.S. at 609. Can it be doubted that a requirement that the defendant proffer his testimony before he is entitled to a ruling on whether he may be impeached by a prior conviction is not a similar "impermissible restriction"? Not only does it chill his free choice whether or not to testify but it trespasses on his Fifth Amendment rights and obliquely extracts a form of discovery to which the prosecution is not otherwise entitled.

Ignoring this line of authority this Court appeared to take the view that Madonna could not claim an adjudication under the canons of Rule 609 unless he first proffered his testimony.

For these reasons, the affirmance from the bench in this case, with respect to this first issue, was plainly wrong in its conclusion and plainly improvident in its manner.

## 2. The Out-of-Court Declaration

The evidence against Madonna was thin and circumstantial. In effect, everything turned on whether a car which he had rented in a false name was used with his knowledge for the purpose of transporting heroin. A friend of Madonna's, co-defendant Larca, had loaned the car to one, Boriello, who had picked up heroin, put it in the trunk of the car and then taken it to a place in Manhattan where Larca and Madonna met him and took charge of the car. Neither Boriello nor any other witness implicated Madonna in any direct way in the heroin transaction. Thus, whether Madonna had prompted Larca to lend the car to Boriello and why Madonna was at the Manhattan rendezvous to take back the car were the crucial, indeed the only, issues in the case as to Madonna.

Madonna's defense was that he had rented the car in a false name because he was conducting a clandestine extra-marital affair and the car was for the use of his girlfriend who was flying in from Florida. Madonna contended that Larca had given the car to Boriello without his permission and that the meeting in Manhattan was merely to retake possession of his car which he needed for his own purposes. That Madonna did maintain a residence with his girl-friend in Florida and that this residence was rented in the same false name under which he had rented the car were established by numerous witnesses.

Clearly the jury's reception of this defense might have been more favorable had Madonna been able to testify, but, as we have seen, the court's ruling on the prior conviction made this impossible. The defense then sought to present the testimony of two witnesses who made a proffer that they would have testified that they heard Madonna say angrily to Larca: "How could you lend somebody I don't even know my car?" The trial court ruled that the proffered testimony was inadmissible hearsay, over defense objections that it was either not hearsay at all or was admissible under the state-of-mind exception contained in Rule 803(3), Fed. R. Ev. Thus Madonna was denied the opportunity to offer any evidence as to what happened between Larca's lending the car to Boriello and Madonna's retaking possession of the car in Manhattan some hours later.

In affirming, this court appears to have held that the declaration was properly excluded since it did not relate to Madonna's intention to do a future act but rather to the performance of past acts. This view of the matter looks at the declaration through the lens of the time-worn *Hillmon-Shepard*<sup>3</sup> controversy, which Madonna's main brief had amply demonstrated is not centrally relevant to the question at issue. For in this case there was no

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<sup>3</sup> *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892), and *Shepard v. United States*, 290 U.S. 96 (1933).

question of seeking to prove that Madonna had done some future act, nor was the declaration offered to prove past acts. That Madonna had rented the car and that Larca had loaned it to Boriello were amply demonstrated in the government's case in chief and were never contested by the defense. The purpose of introducing the declaration was as circumstantial evidence that Madonna had no criminal knowledge or intent at the time when the declaration was uttered and, inferentially, no such intent or knowledge a few hours later when he collected the car from Boriello.

In the oral argument this court made much of the point that the declaration did not identify the car and might be taken to refer to any car. In the first place, in the context of the whole record in the case, it is a tortured speculation to suppose that any other car could conceivably have been the subject of the statement. Second, this should not matter anyway. If any ambiguity could be extracted from the declaration, that could have been brought out on cross-examination and in summation to the jury. The defendant was entitled to have the jury know that witnesses had heard him utter a declaration arguably incompatible with guilty knowledge. In that context, offered for that purpose, the declaration is best understood as not being hearsay at all; if thought of as hearsay it certainly comes under the state-of-mind exception. By excluding it and also precluding Madonna's taking the stand the trial court amputated the right arm of the defense.

### **General Observations**

Defendant had the kind of trial, unhappily not unfamiliar, in which the court acceded to every government request and peremptorily dismissed all defense motions. The government was allowed to introduce the most tenuous evidence of alleged prior similar acts, was permitted to inject inflammatory references to "Mafiosi" and the "Godfather" and coyly to plant racial slurs about Italians. No doubt enthused by this unbridled license,

the prosecutor went on in his summation to proffer the most deadly distortions of the record, which the court refused to correct or rebuke when the defense objected. (These points seem to have gone unnoticed by this court in its affirmance). By contrast the defendant was effectively not permitted to put on a defense. All these assertions were documented in appellant's main and reply briefs and it was shown that the most serious questions of unclarified law were involved, implicating the basic constitutional rights of the defendant. In such a case as this, this court chose to affirm from the bench.

There are the gravest dangers to our jurisprudence in such a malpractice. The A.B.A. *Standards Relating to Appellate Courts*, 3.36, (Tentative Draft, 1976) state:

A full opinion reciting the facts, the questions presented, and analysis of pertinent authorities and principles, should be rendered in cases involving new or unsettled questions of general importance.

The dangers of such an affirmance are well distilled by one author commenting on the Fifth Circuit's Rule 21, that provides for affirmance from the bench in special circumstances:

But the use of affirmances without opinions is certainly not to be encouraged in other than clearly deserving cases. That disposition fails to leave its track in the law and leaves litigants with the impression that no one really heard their appeal. An erroneous result, although reached more quickly under the Rule, is still an intensely important matter for the litigants. That the error is safely hidden would be small consolation for them. The rule is also subject to abuse. An unexplained affirmance, reached through valid processes and indeed within any of the four criteria of Rule 21, is probably inconsequential. But any decision made under Rule 21 because the court was unwilling to expose itself to criticism for an erroneous or unjust result clearly constitutes an abuse of the court's power, subordinates justice to speed, and

subverts needed improvements to illegitimate ends. In times of growing distrust of governmental authority, the courts perhaps ask too much when, by a one line disposition, they ask lawyers, litigants, and scholars to accept their uncriticizable result. More importantly, in their use of this tool a circuit court, performing its function in the federal system, should guard against the criticism that has been leveled at the Appellate Division of the Supreme Court of New York. Professor Hazard alleges that the courts of the Appellate Division "ceased long ago to write extended thoughtful opinions, except on rare occasions, and have become what they are in name, virtually a branch of the trial court rather than an intermediate tribunal for plenary review." (Footnotes omitted).

Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 Wash. U.L.Q. 257, 272-73.

That comment fits this case well. When the defendant was sentenced to thirty years in prison, when there are the most substantial issues on appeal, arising under new federal rules not yet authoritatively interpreted in this circuit, when other circuits have reached decisions of a contrary tendency, then affirmance from the bench is an unseemly rush to judgment that can only be rectified by a rehearing by this court sitting in banc.

### CONCLUSION

**The appeal should be reheard by this court sitting in banc.**

Respectfully submitted,

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